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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 906

MATSON NAVIGATION COMPANY,
Petitioner,

v.

PACIFIC FAR EAST LINE, INC., UNITED STATES OF AMERICA, FEDERAL MARITIME BOARD, MARITIME ADMINISTRATION, CLARENCE G. MORSE, MARITIME ADMINISTRATOR AND FREDERICK H. MUELLER, SECRETARY OF COMMERCE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Matson Navigation Company, a California corporation (hereinafter referred to as Matson), an appellee in the court below, prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the District of Columbia Circuit entered February 4, 1960, vacating the judgment of the District Court. A petition for a writ of certiorari to review the same judgment of the Court of Appeals has been filed in this Court by the Federal Maritime Board, the Maritime

Administration, the Maritime Administrator and the Secretary of Commerce, also appellees below.[1]

Opinion Below

The opinion of the Court of Appeals (R. 674-79),[2] which has not yet been reported, is attached as Appendix A.

Jurisdiction

The judgment of the Court of Appeals, entered February 4, 1960 (R. 680), is attached as Appendix B. The jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code, 28 U.S.C. 1254(1), 62 Stat. 928. This petition is timely under Section 2101(c) of the Judicial Code, 28 U.S.C. 2101(c), 62 Stat. 962, as amended, 63 Stat. 104. Reliance is also placed upon Section 10 of the Act of December 29, 1950, 5 U.S.C. 1040, 64 Stat. 1132, to the extent that such section may be deemed applicable.

Questions Presented

1. Whether the District Court had jurisdiction to review a determination of the Federal Maritime Board and Maritime Administration (hereinafter collectively referred to as the Board) denying Pacific Far East Line, Inc. (hereinafter called PFEL), a subsidized steamship company operating in foreign trade, permission under Section 805(a) of the Merchant Marine Act, 1936, as amended (hereinafter called the Act), to operate in the domestic trade between California and Hawaii.

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[1] A certified copy of the record in the United States Court of Appeals for the District of Columbia Circuit has been filed with the Clerk of this Court.

[2] The reference R. is to the record which contains the opinion of the Court of Appeals. The references J.A. and J.A.S. are to the records before the Court of Appeals, namely, the Joint Appendix and Joint Appendix Supplement, respectively.

2. Whether, if the District Court had jurisdiction to review a determination of this character, Section 31 of the Shipping Act, 1916, as amended, and the provisions of the Judicial Code therein referred to, required the case to be heard before a district court of three judges.

3. Whether the Court of Appeals, in substituting its own interpretation of Section 805(a) for that of the Board and in appraising the Board's factual findings in the light of its own interpretation, (a) failed to accord to the Board's interpretation and application of the statute the weight to which they are entitled, and in the course of so doing (b) improperly countenanced the intervention in the proceedings of the Department of Justice to seek reversal of the Board's determination, after that Department had failed to appear and present its views before the Board.

4. Whether the decision of the Court of Appeals should be reversed because of its failure to require dismissal of the proceedings for lack of jurisdiction or, in the alternative, to affirm the judgment of the District Court.

Statutes Involved

Pertinent provisions of the Shipping Act, 1916, the Judicial Code and the Merchant Marine Act, 1936, are attached as Appendix C.

Statement of the Case

A. *The Proceedings Below*

The present action was brought by PFEL in the United States District Court for the District of Columbia to obtain judicial review of a determination by the Board denying PFEL permission to engage in the domestic, California-Hawaii trade pursuant to Section 805(a) of the Act. (J.A.S. 1-10.) The District Court entered judgment for defendants (J.A.S. 35-36), but the Court of Appeals

reversed, remanding the case for further proceedings before the Board limited to a specified issue, under the circumstances hereafter outlined (R. 679-80).

The proceedings before the Board under review were initiated upon the application of PFEL (J.A. 2). As a subsidized steamship line in the foreign commerce of the United States, PFEL is prohibited from engaging in domestic commerce, such as commerce between the West Coast of the United States and Hawaii, absent the written permission of the Board under Section 805(a). By this statutory provision, the Board is commanded not to grant any application for such permission if it finds that the proposed operations pursuant to the application "will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service [including the West Coast-Hawaii trade] or that it would be prejudicial to the objects and policy of this Act", except in the case of an applicant who has so-called "grandfather rights" (which are not involved as to PFEL). Matson, which for more than 75 years has been engaged as a steamship operator in the West Coast-Hawaii trade, intervened before the Board and has henceforth participated in all of the proceedings before the Board and in the courts.

After a lengthy hearing, extensive briefing and oral argument, the Board denied PFEL's application to engage in the California-Hawaii trade. In reaching this determination, the Board relied upon its several prior decisions interpreting and applying Section 805(a). (J.A. 14.) Based upon numerous subsidiary findings, the Board determined that Matson maintains an adequate service, at only a modest profit; that it has the capacity to carry the cargo available to it; and that the diversion of the volume of cargo which PFEL would carry if its application were granted would seriously jeopardize Matson's replacement

program and impede the proper development and continuation of Matson's California-Hawaii service (J.A. 13-18.) The Board concluded that to grant PFEL's application would result in unfair competition to Matson and would also be prejudicial to the objects and policy of the Act. (J.A. 18.)

Following the Board's determination, which was served May 14, 1957, PFEL filed a petition for review directly with the Court of Appeals, relying upon the Act of December 29, 1950, 5 U.S.C. 1031, 64 Stat. 1129, as amended. At the same time, PFEL filed its complaint in the District Court in the present proceedings. The Court of Appeals, on PFEL's petition for direct review by that court, dismissed the case for lack of jurisdiction, holding that the Act of December 29, 1950, was inapplicable to the review of actions by the Board under Section 805(a) of the Act. *Pacific Far East Line, Inc.* v. *United States and Federal Maritime Board, et al.*, 225 F. 2d 182. Certiorari was thereafter denied by this Court, 358 U.S. 866.

Following the dismissal of its petition to the Court of Appeals, PFEL proceeded with its suit in the District Court. PFEL filed a motion for summary judgment, the Board filed a motion to dismiss or for summary judgment, and Matson filed a motion for judgment on the pleadings or for summary judgment. (J.A.S. 28-34.) Both the Board and Matson contended, among other matters, that the Board's determination by its nature was not subject to judicial review; Matson also suggested that if the matter were subject to judicial review, the case should be heard by a three-judge district court pursuant to Section 31 of the Shipping Act, 1916, as amended. Thereafter, the United States, represented by the Department of Justice, filed a motion to intervene, contending that the Board had erroneously interpreted Section 805(a) of the Act, and that the case should be remanded to the Board. (J.A.S. 22-23,

25-26.) Over the objection of Matson (J.A.S. 23-24), the Department of Justice was permitted to intervene (J.A.S. 25). The Court then granted the motions of the Board and Matson for summary judgment (J.A.S. 35-36).

Both PFEL and the United States, represented by the Department of Justice, appealed to the Court of Appeals (J.A.S. 37), with the Board and Matson as appellees. The Court of Appeals held that the District Court had jurisdiction, that the Board had misinterpreted Section 805(a) of the Act, and that the granting of the application of PFEL to serve Hawaii in domestic commerce would not result in unfair competition to Matson in the sense of Section 805(a). As to the Board's further determination that the granting of the application would be prejudicial to the objects and policy of the Act, the Court held that the Board's determination was unclear as to the basis for this decision. It thereupon vacated the judgment of the District Court and remanded the case to the Board for further proceedings, limited to the question of whether PFEL's entry into the trade would be prejudicial to the objects and policy of the Act. (R. 679-80.)

B. *The Status of PFEL*

Any nonsubsidized United States steamship operator is free to engage in domestic services between the continental United States and Hawaii without the granting of a franchise or other permission of any character. PFEL, which commenced operations to the Far East in 1946, was perfectly free to enter the Hawaiian domestic service until 1953, when it applied for and obtained from the Board operating subsidy with respect to its Far East service in foreign commerce. (J.A. 165, Exh. 25, pp. 7-8, J.A. 462-464.) Such operating subsidy, as well as construction subsidy, provided for by the Act, are denied operations in the domestic service, such as that conducted by Matson.

By so electing to obtain the benefits of operating subsidy, PFEL necessarily elected to bring itself within the limitations imposed by Section 805(a) of the Act. PFEL accepted similar limitations in Article II-15 of the operating subsidy contract which it executed with the United States, acting by the Board. (J.A. 164, Exh. 60, J.A. 547-548.)

In summary, PFEL was perfectly free to enter the Hawaiian domestic trade, without franchise or permission of any kind, so long as it remained unsubsidized. The Board, and subsequently the courts, became involved in this affair solely because PFEL elected to seek and obtain the Government's bounty.

Reasons for Granting the Writ

In the interest of limiting this petition, we respectfully refer the Court to, and incorporate herein by reference, the discussion set forth under this heading and elsewhere in the petition for a writ of certiorari from the judgment below filed by the Federal Maritime Board, the Maritime Administration, the Maritime Administrator and the Secretary of Commerce.

Reviewability of the Board's determination under Section 805(a) of the Act. As stated in the petition for certiorari above referred to, the success of the United States in maintaining one of the foremost merchant marines of the world in foreign commerce is due primarily to the subsidy program provided by the Act. Some 15 United States flag steamship lines have operating subsidy contracts with the United States, represented by the Board. On a week to week, and indeed a day to day, basis, the Board is called upon to determine innumerable matters in connection with the administration of these contracts. One such matter is presented by Section 805(a) of the Act, when, as here, an operator seeks a waiver of the statutory and contractual provisions prohibiting his engaging in the domestic trade.

If such determinations, and specifically the Board's determinations under Section 805 (a), are to be subjected to the intervention of the courts at the instance of the contracting operator, it is apparent that the work of the Board and the program of the United States will be seriously handicapped. The reviewability of such determinations presents an important question of federal law which has not been, but should be, settled by this Court.

Determinations under Section 805(a) would seem to present the classic situation for the denial of judicial review. The restraints of that provision, as we have seen, are not of general application but become operative only as to a steamship line which has deliberately elected to contract with the United States for subsidy payments. Certainly, PFEL has no constitutional or common law right to the payment of operating subsidy. Congress has offered such subsidy upon conditions, one of which is that the subsidized operator may not engage in domestic commerce without the written permission of the subsidy-paying party to the contract, that is, the United States of America. PFEL has been accorded the hearing which Congress provided before the Board, and its application has been denied. Having elected to obtain the benefits which Congress has granted, subject to conditions, the beneficiary must likewise accept the conditions.

Section 10 of the Administrative Procedure Act, Act of June 11, 1946, 5 U.S.C. 1009, 60 Stat. 237, excepts from judicial review cases where "(1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." It can hardly be doubted, except in the case of "grandfather rights", that the Board is invested with discretion as to whether to grant under Section 805(a) the application of a subsidized contractor. In *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317, this Court, in dealing with the complaints of steamship operators contract-

ing with the United States, re-emphasized that agency action involving "matters on which experts may disagree; . . . nice issues of judgment and choice . . . which require the exercise of informed discretion" constitutes "agency action . . . by law committed to agency discretion" and is not subject to judicial review. It is likewise difficult to discern in what manner PFEL, under Section 10(a) of the Administrative Procedure Act, has suffered any "legal wrong" or has been "adversely affected or aggrieved . . . within the meaning of any relevant statute."

The opinion of the Court of Appeals gives scant attention to this subject and makes no reference in this connection to the fact that the payment of the Government's bounty, subject to conditions, is involved. (R. 674-90.) Its decision on this point conflicts in principle with the holdings of this Court in *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *Butte, A. & P. Ry.* v. *United States*, 290 U.S. 127; *Gt. Northern Ry.* v. *United States*, 277 U.S. 172; *Work* v. *Rives*, 267 U.S. 175; and *United States* v. *Babcock*, 250 U.S. 328. And see *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U.S. 103.

The requirement of a Three-Judge District Court. Neither Section 805(a) of the Act nor any other of its sections contains any applicable provision for judicial review. However, Section 31 of the Shipping Act, 1916, as currently in effect, provides that the procedure to review orders of the Board shall be the same as that prescribed for review of orders of the Interstate Commerce Commission. The reference here is to the Urgent Deficiencies Act of 1913, now codified in the Judicial Code, 28 U.S.C. 1336, 2321-25.

Section 31 is now in large measure superseded by the Act of December 29, 1950, *supra*. The Court of Appeals has held, nevertheless, that orders entered under authority of the Merchant Marine Act, 1936, and specifically the determination here involved, are not reviewable under the Act of December 29, 1950, and this Court denied certiorari. *Pacific*

Far East Line, Inc. v. *United States and Federal Maritime Board, et al., supra.* It would seem to follow that if the determination herein is reviewable at all, Section 31 of the Shipping Act of 1916 controls.[3]

If Section 31 controls, it was essential that a three-judge district court be convened to hear the case; a single judge lacked power. This point is, of course, jurisdictional. *Lambert Co.* v. *Balt. & Ohio R.R. Co.*, 258 U.S. 377; *Ayrshire Corp.* v. *United States*, 331 U.S. 132; *cf. Stratton* v. *St. Louis S. W. Ry.*, 282 U.S. 10. Although this matter was called to the attention of both the District Court and the Court of Appeals, neither appears to have given it any consideration.

If, contrary to the views we have expressed above, determinations of the Board under Section 805(a) are subject to judicial review, the procedure for such review likewise presents an important question of federal law which has not been, but should be, settled by this Court.

The treatment by the Court of Appeals of the Board's determination under Section 805(a). (a) In substituting its own interpretation of the statute and its own appraisal of the facts in the light of that interpretation, for that of the Board, the Court of Appeals decided federal questions in a way in conflict with the applicable decisions of this Court. The interpretation and application of Section 805(a) which the Board brought to bear in the present proceedings are consistent with its line of decisions on this point both before and after the decision here. *American President Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B. 457 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 488 (1954); *Isbrandtsen Company,*

[3] As the Review Act of 1950 recognizes, by its reference to the Intercoastal Shipping Act, 1933, 47 Stat. 1425, as amended, 46 U.S.C. 843, Section 31 of the 1916 Act is applicable to Board action under later statutes.

Inc.—Subsidy, E/B Round-the-World, 5 F.M.B. 448 (1958); *T. J. McCarthy—Application for Section 805(a) Permission*, dated December 4, 1959, modified April 26, 1960); *American President Lines, Ltd.—Applications Under Section 805(a), Merchant Marine Act, 1936*, decided April 28, 1960.

These decisions constitute a consistent and continued administration of the statute by the agency to which Congress has entrusted this task. Accordingly, the courts, even assuming that jurisdiction to review existed, are limited to ascertaining whether there is "warrant in the law and the facts" for what the agency has done. "Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the" agency's "discretion, the reviewing court is without authority to intervene." *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 536. Illustrative of this line of cases is *National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, 130-131.

A careful reading of the opinion of the Court of Appeals demonstrates that, in fact, no substantial reason was given for refusing to accept the Board's interpretation and application of Section 805(a). The concluding paragraph of Section 805(a) makes it a misdemeanor for any operator to divert, directly or indirectly, moneys from subsidized foreign-trade operations into domestic operations. This provision obviously continues in operation even after an application has been granted under Section 805(a) of the Act; hence, it provides no test of the circumstances under which a pending application should be granted. Evidently referring to this paragraph, the Court of Appeals observed (R. 678):

> "Congress plainly did intend to prevent that sort of competion. *We need not consider whether it intended to prevent some other sorts as well.* We think Congress

clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL." (Emphasis ours.)

It will be seen that by its refusal to consider what other sorts of competition Congress prohibited, the court failed to give consideration to the critical point in the case. Its condemnation of the Board's decision is a description of the court's conclusions rather than an analysis of wherein the Board was wrong.

(b) The Court of Appeals countenanced the intervention by the Department of Justice, even though the Department had failed to appear before the Board, and permitted it to urge before the courts an interpretation of Section 805(a) at war with the line of Board decisions above-mentioned. This action was taken by the Department of Justice, and tolerated by the Court of Appeals, despite the decision of this Court in *United States* v. *R.C.A.*, 358 U.S. 334. That decision would appear to leave the Department adequately free to enforce enactments entrusted to its care by the Congress, notwithstanding the decision of an administrative agency such as the Board. This action of the Department challenges, we submit, the fundamental principle of primary jurisdiction which has been developed and applied by this Court. *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426; *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474; *Far East Conf.* v. *United States*, 342 U.S. 570; *United States* v. *Western Pac. R. Co.*, 352 U.S. 59; *S. W. Sugar Co.* v. *River Terminals*, 360 U.S. 411, 420-421.

In these circumstances the intervention of the Department of Justice in the court proceedings, after it had failed to appear before the Board, was in conflict with the applicable decisions of this Court, and makes appropriate an

exercise of this Court's power of supervision over the lower courts.

The Board's decision was correct. On the merits, the Board's decision was right, and little need be added to the discussion set forth in its petition for a writ of certiorari.

The Board properly took into consideration that "special concern for the protection" of the domestic operator which impelled Congress to include Section 805(a) in the Act. Pointing out that "doubts should be resolved" in favor of protection, the Board cited its own prior decisions to this effect. (J.A. 14, 16.) The Board properly did not make detailed findings to establish the benefit which the Government subsidy payments bestowed upon PFEL, and the advantage which the subsidized operator has over the unsubsidized domestic operator. Congress itself has established the nexus between (1) payment of subsidy to an operator in foreign commerce and (2) the presumptive unfair impact of the competition of such a subsidized operator upon an unsubsidized operator in domestic commerce.

The Board's determination that PFEL's competition would "seriously jeopardize" and "impede" Matson's Hawaiian service (J.A. 17) was not, and could not be, challenged by the Court of Appeals. Finding that Matson was maintaining an adequate service, the Board therefore concluded that Matson was "fundamentally entitled" (J.A. 16, 17) to the available cargo as against a subsidized operator, such as PFEL. At the same time, the Board carefully pointed out that any unsubsidized American operator is free to enter the trade in competition with Matson and others at any time without Board permission. (J.A. 11, 18.)

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May, 1960.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15085

PACIFIC FAR EAST LINE, INC., APPELLANT

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

No. 15086

UNITED STATES OF AMERICA, APPELLANT

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Decided February 4, 1960

Mr. Donald E. Van Koughnet for appellant in No. 15085.

Mr. Richard A. Solomon, Attorney, Department of Justice, with whom *Mr. Henry Gieller*, Attorney, Department of Justice, was on the brief, for appellant in No. 15086.

Mr. Edward Aptaker, Chief, Regulation Branch, Division of Litigation, Federal Maritime Board, with whom *Messrs. E. Robert Seaver*, General Counsel, Federal Maritime Board, *Robert E. Mitchell*, Assistant General Counsel, Federal Maritime Board, and *Edward Schmeltzer*, Attorney, Federal Maritime Board, were on the brief, for appellees Federal Maritime Board, Maritime Administration, Clarence G. Morse, Maritime Administrator, and Frederick H. Mueller, Secretary of Commerce.

Mr. Alvin J. Rockwell, with whom *Mr. Willis R. Deming* was on the brief, for appellee Matson Navigation Company.

Before EDGERTON, WILBUR K. MILLER, and BASTIAN, *Circuit Judges.*

EDGERTON, *Circuit Judge:* Pacific Far East Line, Inc. (PFEL) asked the District Court to set aside an order of the Federal Maritime Board and the Maritime Administrator (collectively called "the Board") denying PFEL's application for permission to operate unsubsidized vessels between the Pacific Coast and Hawaii.[1] The United States intervened in the District Court as a plaintiff in opposition to the Board's order. Matson Navigation Company (Matson), which had intervened before the Board in opposition to PFEL's application, intervened as a defendant in the District Court in support of the Board's order. These are appeals by the plaintiffs from an order of the District Court granting the defendants' motions for summary judgment.

Appellant PFEL operates a subsidized service between California and the Far East, and an unsubsidized service between California and Guam. Intervenor Matson has operated in the Pacific Coast-Hawaii trade for more than 70 years and is said to carry 98% of the cargo in that trade. Matson is not subsidized directly, but operates a subsidized service to Australia through Oceanic Steamship Co., a wholly-owned subsidiary.

Section 805(a) of the Merchant Marine Act of 1936, 46 U.S.C. § 1223(a), forbids the payment of a subsidy to any person who, without written permission from the Board, owns or operates vessels "in the domestic intercoastal or coastwise service", which of course includes the California-Hawaii trade that PFEL seeks to enter. Persons interested in an application for such permission are authorized to intervene before the Board, and the Board is required to "give a hearing to the applicant and the intervenors." The Board is not to grant permission if the Board "finds it will result in unfair competition to any person, firm, or corporation operating exclusively in

[1] We dismissed for want of jurisdiction a petition for direct review of the Board's order in this court, expressing no opinion as to the District Court's jurisdiction of the present suit. *Pacific Far East Line* v. *United States*, 103 U.S.App. D.C. 104, 255 F. 2d 182, *cert. denied*, 358 U.S. 866.

the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter." It is made a misdemeanor for one who has received such permission "to divert, directly or indirectly, any moneys . . . used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations. . . ."

After a long hearing, the Board's examiner recommended granting PFEL's application. The Board denied it by a divided vote. The Board found that if the application were granted, PFEL "would be in a position to concentrate primarily on high value commodities, and would, in effect 'skim the cream' in this trade" between the Pacific Coast and Hawaii; that although PFEL's competition might divert less than 10% of Matson's tonnage, "the diversion of Matson revenues may be substantially greater"; that the diversion "would seriously jeopardize Matson's vessel replacement program, and would impede the proper development and continuation of Matson's California/Hawaii service"; and that the "record fails to show the need for service in excess of that presently provided by Matson and other existing operators". The Board concluded that "to permit PFEL to carry cargoes in the California/Hawaii trade would result in unfair competition to Matson in its California/Hawaii service, an exclusively domestic service, and would be prejudicial to the objects and policy of the Act." The Board thinks "a subsidized operator should not be permitted to deprive regular domestic carrjers of cargoes which they need, have the capacity to carry," and to which the Board considers them "fundamentally entitled".

Section 10 of the Administrative Procedure Act subjects "every agency action" to judicial review, except so far as "(1) statutes preclude judicial review or (2) agency action" is by law committed to agency discretion. . . ." 5 U.S.C. 1009. The Merchant Marine Act does not preclude judicial review and does not commit the Board's action to the Board's discretion. Administrative action that requires a hearing and turns on the meaning and application of statutory language is usually subject to

judicial review. As in *Shields* v. *Utal Idaho Central R. Co.*, 305 U.S. 177, 183, "The nature of the determination points to the propriety of judicial review." Nothing in the legislative history indicates a contrary intention. Accordingly the District Court had jurisdiction of this suit.

The Board did not find, and the evidence does not show, that PFEL would have any competitive advantage over Matson in the California-Hawaii trade because it has a subsidy in the Far East trade. As the examiner said, "Matson's witness admitted that the fact that PFEL has a subsidy would not permit PFEL to obtain more cargo in competition with Matson than it would without a subsidy." The Board did not find and the record does not show that PFEL would compete fraudulently; or that it would engage in cutthroat competition, either by fixing rates below cost and using the profits of its subsidized Far East trade to carry the loss, or by paying sub-standard wages, or by using sub-standard ships, or otherwise; or that it would compete in any way that is unfair according to accepted legal or ethical standards. The Department of Justice, on behalf of the United States, urges that competition is not "unfair" within the meaning of the Act when it does not involve diversion of money to unsubsidized domestic operations from subsidized foreign operations, to the disadvantage of an unsubsidized operator. Congress plainly did intend to prevent that sort of competition. We need not consider whether it intended to prevent some other sorts as well. We think Congress clearly did not intend to prevent anything that the Board or the evidence attributes to PFEL.

The Board practically equated unfair competition with effective competition. But what is bad for Matson is not necessarily bad for the country. However adequate Matson's service may be, and in whatever sense Matson may "need" to retain its monopoly of the California-Hawaii trade, we cannot accept the Board's view that Matson is "fundamentally entitled" to retain this monopoly as against a competitor that is subsidized—as Matson itself is, through its subsidiary Oceanic—in a different

trade. Service and need would be important if the Board were a public utility commission passing upon an application to enter a regulated field, but have nothing to do with the question whether PFEL's competition with Matson would be "unfair".

The Board has disclosed no basis for its finding that PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act." Preservation of Matson's monopoly is not an object or policy of the Act. On the contrary, the public interest in ending this monopoly should be considered. The Act does not except the California-Hawaii trade from the anti-monopoly policy which Congress has often expressed.

The appellants do not ask that we reverse the Board's finding with regard to "objects and policy", but only that the case be remanded to the Board so that it may reconsider this finding and clarify it if it is retained. We are adopting this suggestion. The Board should, at least, "make the basis of its action reasonably clear. We cannot find that it did so here." *Radio Station KFH Co.* v. *Federal Communications Commission*, 101 U.S.App.D.C. 164, 166, 247, F. 2d 570, 572. "'Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 654.

The judgment is vacated, and the case is ordered to be remanded for further proceedings by the Board limited to the question whether PFEL's entry into the trade would be "prejudicial to the objects and policy of the Act."

Vacated and remanded.

APPENDIX B

Filed February 4, 1960. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1959.

Civil 1708-57

No. 15,085

PACIFIC FAR EAST LINE, INC., APPELLANT,

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

September Term, 1959

Civil 1708-57

No. 15,086

UNITED STATES OF AMERICA, APPELLANT,

v.

FEDERAL MARITIME BOARD, ET AL., APPELLEES

Appeals from the United States District Court for the District of Columbia

Before: EDGERTON, WILBUR K. MILLER and BASTIAN, *Circuit Judges.*

JUDGMENT

These cases came on to be heard on the record on appeals from the United States District Court for the District of Columbia, and were argued by counsel.

ON CONSIDERATION WHEREFORE, It is ordered and adjudged by this court that the judgment of the District Court in the case appealed from herein is vacated, and that the case is remanded to the said District Court for further proceedings by the Federal Maritime Board limited to the question whether Pacific Far East Line's entry into the trade would be prejudicial to the objects and policy of the Merchant Marine Act of 1936.

Per Circuit JUDGE EDGERTON.

Dated: February 4, 1960.

APPENDIX C

Statutes Involved

Section 31 of the Shipping Act, 1916, 39 Stat. 738, as amended, 46 U.S.C. 830, provides as follows:

> "The venue and procedure in the courts of the United States in suits brought to enforce, suspend, or set aside, in whole or in part, any order of the Federal Maritime Board shall, except as otherwise provided, be the same as in similar suits in regard to orders of the Interstate Commerce Commission, but such suits may also be maintained in any district court having jurisdiction of the parties."

Title 28, U.S.C., 62 Stat. 869, as amended, contains the following provisions:

> Sec. 2321. "The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter."
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> Sec. 2322. "All actions specified in section 2321 of this title shall be brought by or against the United States."
>
> Sec. 2325. "An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."
>
> Sec. 2284. "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
>
> • • • • • • •

"(5) * * * A single judge shall not * * * enter a summary or final judgment. * * *"

Section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223(a) provides:

"It shall be unlawful to award or pay any subsidy to any contractor under authority of sections 1177-1182 of this title, or to charter any vessel to any person under sections 1191-1204 of this title, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Federal Maritime Board or the Secretary of Commerce. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Board or Secretary shall give a hearing to the applicant and the intervenors. The Board or Secretary shall not grant any such application if the Board or Secretary finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this chapter: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no

control, the Board or Secretary shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

"If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."